United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

588

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,744

UNITED STATES OF AMERICA

v.

CHARLES HAMMONDS,

Appellant.

On Appeal from a Verdict and Judgment of the
United States District Court for the District of Columbia

BRIEF FOR APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Whether the record evidence at the close of the Government's case-in-chief was sufficient to permit an inference beyond a reasonable doubt that Appellant had entered the dwelling with specific intent to steal.

2. Whether the record evidence at the close of the Government's case-in-chief was sufficient to permit an inference beyond a reasonable doubt that another person was present in the dwelling at the time Appellant entered.

3. Whether the closing argument by Appellant's court-appointed trial counsel was such gross error as to constitute ineffective assistance of counsel.

This case was not previously before the Court.

REFERENCES TO RULINGS

(None)

STATEMENT OF THE CASE

Appellant was arrested on April 26, 1968 and, after a preliminary hearing the next day in the District of Columbia Court of General Sessions, was held on $10,000 bond for grand jury action.

On May 28, 1968, a grand jury of the United States District Court for the District of Columbia issued a presentment charging Appellant with first degree burglary (22 D.C. Code § 1801(a)), assault with a dangerous weapon (22 D.C. Code § 502), assault on a member of the police force with a dangerous weapon (22 D.C. Code § 505(b)) and petit larceny (22 D.C. Code § 2202). The true bill drawn up by the United States Attorney added the charge of assault on a member of the police force (22 D.C. Code § 505(a)).

Defense counsel for Appellant was appointed by the court on July 2, 1968, and Appellant was arraigned upon the indictment in the District Court on July 5, 1968, at which time, in the absence of counsel, Appellant was directed to plead not guilty (Arraignment Tr. (one page)).[1/]

Jury trial was held before Judge John H. Pratt in the District Court on November 20 and 21, 1968. Upon notice by the prosecutor (Tr. 33) and motion by defense counsel (Tr. 88), the court dismissed the petit larceny

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1/ The record transcripts include: (1) opening argument, evidentiary trial, jury instructions, and remand of Appellant to custody ("Tr."); (2) closing arguments of counsel ("Arguments Tr."); (3) voir dire and sentencing ("Supp. #2 Tr."); and (4) arraignment ("Arraignment Tr. (one page)").

count (Tr. 89) because of error in the indictment. On the remaining counts, the jury found Appellant guilty of first degree burglary, guilty of assault with a dangerous weapon, guilty of assault on a police officer with a dangerous weapon, and not guilty of assault on another police officer.

On January 24, 1969, the court sentenced Appellant to imprisonment for concurrent terms of 5-to-15 years for first degree burglary, 1-to-3 years for assault with a dangerous weapon and 2-to-6 years for assault on a member of the police force with a dangerous weapon. This appeal followed.

At the trial of Appellant the jury voir dire was conducted with a minimum of questions by the Assistant U. S. Attorney and with no questions by defense counsel or the court (Supp. #2 Tr. 1-6). The prosecutor made an opening statement to the jury (Tr. 4-9); defense counsel reserved his opening statement (Tr. 9) but subsequently waived it (Tr. 34).

The testimony of Government witnesses may be summarized as follows: Mrs. Mamie Bellinger and Mr. Morgan Elmore testified that between 9:00 and 9:45 p.m. on April 26, 1968, in the house at 1615 A Street, Northeast, in the District of Columbia, the eight-year-old son of Mrs. Bellinger went into the second-floor kitchen, from where he saw in the adjoining "double bedroom" ("big enough for two beds") "a foot up on the bed"--a foot of "someone . . . under your bed," he told his sister who was in the bedroom (Tr. 11, 13). Apparently then called into this bedroom, Mrs. Bellinger "saw a man up under the bed"—"he didn't move" (Tr. 11). Mrs. Bellinger gathered an undisclosed number of her six children living in the apartment

and went downstairs to seek the assistance of her brother-in-law, Mr. Elmore, who was the owner of the house (Tr. 10, 11-12, 16). She told Elmore that someone was under the bed and sent him upstairs (Tr. 11-12).

When Elmore reached the top of the stairs he went through Mrs. Bellinger's kitchen to enter the bedroom where he saw "this man getting out from under the bed" (Tr. 17). Elmore testified that he asked Appellant a couple of questions, but Appellant did not respond. Appellant moved toward the bedroom door, and ran through the kitchen, down the stairs and out the front door. Elmore said that when he continued to chase Appellant down the street, Appellant thrust at him, but did not strike him, with a knife. (Tr. 18.)

After further chase and Appellant's withdrawal under a house porch (Tr. 18-19), police officers James Sloan and Clifton Hicks arrived, and Appellant "very meek[ly]" obeyed when he was ordered to come out (Tr. 28-29). At one point during the arrest, there was a scuffle in which, according to the Government's testimony, Appellant struck officer Sloan with his hand and with a knife, and officer Hicks intervened (Tr. 24-25).

The knife which was said to have been taken from Appellant was identified as belonging to Mrs. Bellinger and as having been in her kitchen (Tr. 13).

Defense counsel conducted no cross-examination of Mr. Elmore (Tr. 21) and officer Sloan (Tr. 25) and slight cross-examination of Mrs. Bellinger

(Tr. 13-14) and officer Hicks (Tr. 31-32). Counsel's motion for judgment of acquittal at the close of the Government's case was denied by the court (Tr. 33).

Appellant testified at the trial that on the day in question he had been drinking heavily in another part of the city and that he had no recollection of how he came to be in the Elmore house or of any events in the house, until Elmore "hollered at me." Appellant said he did not remember being under a bed but recalled being "chased out of the man's house, I was in somebody else's house." (Tr. 40-42.) Appellant remembered being pursued down the street by Elmore and hiding to escape him, but denied any knowledge of the knife with which he was said to have struck at Elmore and officer Sloan (Tr. 45-46, 62-63, 65-67). Appellant said he was "pushed by the officer, and I turned around to see who it was, you know, and grabbed him, and we were tussling together" (Tr. 48).

The Assistant U. S. Attorney cross-examined Appellant carefully (Tr. 48-76); defense counsel's short redirect examination was pointless (Tr. 76-77).

The prosecutor recalled the police witnesses to give rebuttal testimony; defense counsel did not cross-examine. (Tr. 82-84.)

In his closing argument (Arguments Tr. 2-5), the Assistant U. S. Attorney outlined the evidence of the Government's case. He ended by suggesting that Appellant's testimony was "a form of selective recollection" and that there was a "gap in credibility between the evidence which has been put forth by the government and the evidence which has been put forth by the defendant . . . ."

The complete summation by defense counsel (Arguments Tr. 5-7) is reproduced below:

"May it please the Court, and ladies and gentlemen of the jury, I shan't take over ten minutes of your time in addressing you in this matter.

"Counsel for the government has talked to you. He has a job to do, and I have a job to do, and I am just about at the end of mine. We are both members of the bar, in good standing, assigned to our respective duties. He is prosecuting in behalf of the government of the United States, and I am defending as best I can the interests of this defendant.

"I shan't get emotional about this matter. I shan't get loud about it. And I shan't be very long.

"This is a relatively short case. It's taken very little time to try it up to this point, and I have a feeling that this case will ultimately be decided in a relatively short period of time.

"I am not going to rehash and repeat the details of this unfortunate event. I don't see any need for it.

"This jury is supposed to be a jury of this defendant's peers, and I daresay it is.

"I am not going to characterize the testimony of any witness here or indulge in any judgment of my own as to who is credible and who is not. I will leave that to you.

"This task, as any other task in a criminal trial, is a rather tedious one.

"All I ask you ladies and gentlemen of the jury to do is what you are supposed to do. That's all. No more, no less.

"The Court will give you the law, and along with the law should come the ultimate result, and that is justice. That's all I'm asking.

"This defendant, no other defendant, can require more than that, to just ask you to render a just judgment based on the evidence and your oath as jurors.

"Again I say to you, ladies and gentlemen of the jury, that this has been such a relatively short case that it is my considered opinion and judgment, too, that I would be more or less insulting and imposing upon you if I said any more than what I have already said.

"Thank you.

"[PROSECUTOR]: No rebuttal, Your Honor."

Both counsel expressed themselves as satisfied with the court's charge to the jury. There was no request for any lesser-included offense instructions. (Tr. 107.)

Following the verdict of guilty on three counts, Appellant was remanded to custody on $10,000 bond after defense counsel declined the court's invitation to speak on Appellant's behalf (Tr. 111-13). Thereafter, at the sentencing proceeding (Supp. #2 Tr. 8-10), defense counsel reviewed the jury's verdict and stated that he was satisifed that the court had a full report on the matter and that he did not have anything to add.

ARGUMENT

I. APPELLANT WAS CONVICTED OF BURGLARY UPON INSUFFICIENT EVIDENCE

The first count of the grand jury indictment of Appellant charged him with first degree burglary, stating that Appellant "entered the dwelling of Morgan Elmore, while the said Morgan Elmore was present in said dwelling, with intent to steal property of another." The Assistant U. S. Attorney read this count to the jury in his opening statement (Tr. 4); the court read it in charging the jury (Tr. 99). Yet the evidence adduced at the trial failed to establish either that complainant Elmore or anyone else was present in the dwelling at the time Appellant entered, as required for conviction of first degree burglary, or that Appellant entered with an intent to steal property, as required under this indictment for conviction of either first or second degree burglary.[2/]

The court should, therefore, have directed a verdict of not guilty on the burglary count upon defense counsel's timely motion made at the close of the Government's case (Tr. 32-33).[3/]

A. The Jury Could Only Speculate on Whether Appellant Entered the Dwelling with Specific Intent to Steal

(The Court's attention is directed to the following parts of the record: indictment; Tr. 4-20, 32-33, 99 100-101.)

The trial court erred in declining to direct a verdict of acquittal on the burglary count at the close of the Government's case-in-chief. The Government had not presented sufficient evidence from which the jury

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[2/] The burglary statute, 22 D.C. Code § 1801, is set out in the Appendix.

[3/] The jury instructions did not serve to alert the jury to the (cont.)

could infer that Appellant entered the house with an intent to commit larceny.

An essential element of first degree burglary is an entry "with intent to break and carry away any part [of the building], or any fixture or other thing attached to or connected thereto or to commit any criminal offense . . ."(22 D.C. Code § 1801(a)). Second degree burglary requires the same specific intent (22 D.C. Code § 1801(b)). "The crucial element . . . is the specific intent which impelled the entry and not the lawful or unlawful manner of entry." United States v. Jeffries, 45 F.R.D. 110, 112 (D.D.C. 1968). See Stewart v. United States, 116 U.S.App.D.C. 411, 324 F.2d 443 (1963); Mills v. United States, 97 U.S.App.D.C. 131, 228 F.2d 645 (1955). At the close of the Government's case, court and jury knew only that Appellant was found in the house under circumstances which raised "grave suspicion" of his purpose in being there.[4/] There was no evidence of the time of day or night or of the manner of his entry, or of whether the house was locked or unlocked, occupied or unoccupied, or dark or illuminated at the time of his entry. The evidence showed that several persons were engaged in

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(cont.) crucial burglary elements in this case. The court did not explain the meaning of "occupied dwelling or room" (Tr. 100), and the court did not make clear that the intent "to commit any criminal offense therein" (ibid; see also Tr. 101) could only mean in the language of the indictment, "intent to steal property of another." Also, the court encouraged the jury to consider "the manner of entry" of Appellant (Tr. 101), even though no evidence on the point had been introduced, while at the same time discouraging the jury from analyzing all the facts and omissions of facts bearing upon the requisite intent, by stating that specific intent "will become important when I discuss with you . . . evidence with respect to the defendant's alleged drunkenness" (ibid.).

4/ "But grave suspicion is not enough." Scott v. United States, 98 U.S. App.D.C. 105, 107, 232 F.2d 362, 364 (1956).

activities about the house--upstairs and downstairs--at the time Appellant was discovered there about 9:00 or 9:45 in the evening (Tr. 10, 16). The only evidence of crime committed inside the house was the taking of a kitchen knife, as likely as not for the purpose of defending himself as he was being pursued by one of the complainants, and thus permitting no reasonable inference beyond a reasonable doubt that Appellant entered the house with specific intent to steal that knife (an unlikely prize) or anything else.

> "[W]here a specific intent is an element of a crime, . . . specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act. 22 C.J.S. Criminal Law § 32, p. 91." 5/

The Government's case did not show that any property from within the house, other than the aforementioned kitchen knife, was found on Appellant's person, or that any property was abandoned by Appellant either inside or outside the house. The Government did not suggest that Appellant was, in any particular, equipped to burglarize; nor did the Government present any evidence showing that Appellant's entry had been by either force or stealth.

The only circumstances other than the knife-taking to which the Government can point as "evidence" of Appellant's motivating intent at time of entry are (1) his concealment and (2) his flight. But both of these circumstances also are as consistent with a factual hypothesis of

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5/ United States ex rel. Vraniak v. Randolph, 261 F.2d 234, 237 (7th Cir. 1958), cert. denied, 359 U.S. 949 (1959). Cf. Ambrose v. United States, 45 App. D.C. 112, 123 (1916). Of course, if Appellant had taken property of a nature and under circumstances permitting an inference that the appropriation of such property to himself was his motivation in entering the house, the same facts could serve to convict him of both larceny and burglary. But such was not the case here.

innocence as an hypothesis of guilt concerning Appellant's specific intent to steal at time of entry, because even without an intent to steal Appellant would have had reason to fear discovery in another person's house and to seek escape when confronted in the house.[6/]

Certainly these circumstances are as consistent with the misdemeanor of unlawful entry on property,[7/] and no more than that, as with the felony of burglary. One can imagine any number of situations in which an unlawful entry is present and the accused appears to be "up to no good" in another's dwelling but where, as here, there is no proof that the entry was for the purpose of committing another crime.[8/] In a case where the charge is burglary, the jury's disbelief of an exculpatory explanation given by the defendant and the jury's decision that he should be punished severely for his trespass do not provide an adequate substitute for the probative and competent evidence of further criminal intent demanded of the Government before the defendant can be put to the task of defending himself. Cf. Duckett v. United States, D.C. Cir. No. 21,614, decided March 12, 1969, slip op.

6/ See Austin v. United States, D.C. Cir. No. 22,044, decided May 27, 1969, slip op.; Bailey v. United States, D.C. Cir. No. 21,428, decided March 7, 1969, slip op., pp. 8-11.

7/ "Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling . . . , against the will of the lawful occupant . . . , shall be deemed guilty of a misdemeanor . . ." (22 D.C. Code § 3102).

8/ See e.g. Best v. United States, 237 A.2d 825 (D.C. App. 1968); McGloin v. United States, 232 A.2d 90 (D.C. App. 1967); see also New York v. Seaman, 21 App. Div. 2d 907, 252 N.Y.S. 2d 140 (2d Dep't 1964).

There was no such evidence in the case at bar from which "a reasonable mind might fairly conclude guilt beyond a reasonable doubt," regarding an intent to steal. Cooper v. United States, 94 U.S.App. D.C. 343, 345, 218 F.2d 39, 41 (1954); Curley v. United States, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232, cert. denied, 331 U.S. 837 (1947).

This Court apparently accepts the proposition that "unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty, and that, where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must be not guilty." Carter v. United States, 102 U.S.App.D.C. 227, 231-32, 252 F.2d 608, 612-13 (1957), explained in Hunt v. United States, 115 U.S.App.D.C. 1, 3, 316 F.2d 652, 654 (1963).[9] It cannot be reasonably found on the facts of this case that Appellant "necessarily intended"[10] to commit the larceny of the kitchen knife or of any other property at the time he entered the house. It would be straining to find here even the "paucity of evidence on intent" which was held insufficient to support a conviction in Braswell v. United States, D.C. Cir. No. 22,127, decided May 20, 1969, slip op.

> "Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless

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[9] See Maryland & Virginia Milk Producers Ass'n v. United States, 90 U.S.App.D.C. 14, 24, 193 F.2d 907, 917 (1951), and cases cited therein; see also Kemp v. United States, 114 U.S.App.D.C. 88, 311 F.2d 774 (1962).

[10] Hammond v. United States, 75 U.S.App.D.C. 397, 398, 127 F.2d 752, 753 (1942).

> the result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence." 11/

Appellant's intent in entering the house could not have been established beyond a reasonable doubt because the jury had nothing to act on but surmise and conjecture. The verdict and judgment on the burglary count must be set aside and the cause remanded to the District Court with directions to enter a judgment of not guilty of burglary, non obstante veredicto. Kemp v. United States, supra.

B. The Jury Could Only Speculate on Whether Any Person Was in the House at the Time Appellant Entered

(The Court's attention is directed to the following parts of the record: indictment; Tr. 4-6, 10-11, 15-18, 32-33; Arguments Tr. 2-3.)

A prima facie case of first degree burglary, of which Appellant was convicted, is presented only "if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking . . ." (22 D.C. Code § 1801(a) (emphasis added)). In this record, there is no evidence from which the jury could have inferred that there was any person in the house at the time that Appellant entered.

Congress intended that the statute be read literally. See H.Rep. No. 387, 90th Cong., 1st Sess. 28 (1967); 113 Cong. Rec. 17184 (1967). The literal meaning of the statute is the meaning adopted by courts of

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11/ Bailey v. United State, supra note 6, at 5; Cooper v. United States, 94 U.S.App.D.C. 343, 346, 218 F.2d 39, 42 (1954).

States with similar statutes. See Reeves v. Alabama, 245 Ala. 237, 16 So. 2d 697 (1943); Newborn v. Mississippi, 205 So. 2d 260 (Miss. 1967); North Carolina v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

The grand jury indictment of Appellant, filed on June 17, 1968--more than six months after the effective date of the burglary provision [12/] --charged that Appellant "entered the dwelling of Morgan Elmore, while the said Morgan Elmore was present in said dwelling . . . ." The Government presented no testimony or other evidence which supports that charge.

The closest that the evidence comes to this subject is in the testimony of the witnesses Mamie Bellinger and Morgan Elmore that they were in the house when Appellant was discovered there. There is no evidence concerning the time of Appellant's entry and no evidence concerning the time or times at which the two witnesses and Mrs. Bellinger's children entered and exited from the house that day.

Accordingly, the verdict and judgment of first degree burglary must be set aside. If the Court disagrees with Appellant's argument in part A above (which, if accepted, would require acquittal of both first and second degree burglary), the cause should be remanded to the District Court for a new trial on a charge of second degree burglary. Hunt v. United States, supra, 115 U.S.App.D.C. at 4, 316 F.2d at 655.

12/ The predecessor housebreaking statute in the District of Columbia (31 Stat. 1323 (1901); 22 D.C. Code § 1801 (1967 ed.)) did not include the actual presence of a person as a necessary element of the crime.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT CLOSING ARGUMENT

(The Court's attention is directed to the following parts of the record: Tr. 1-113; Arguments Tr. 1-7; Arraignment Tr. (one page); Supp. #2 Tr. 1-10.)

The closing argument made to the jury by Appellant's court-appointed trial counsel was such gross error as to constitute ineffective assistance of counsel.[13/]

By no reasonable trial strategy could counsel's jury statement be justified as argument on behalf of his client. Even though the Assistant U.S. Attorney had presented his theory of what the evidence showed (Arguments Tr. 2-5), defense counsel made no counter-argument of substance and did not review any of the evidence taken at trial in order to place it before the jury in a light as favorable as possible to his client.[14/] Defense counsel did not even mention the presumption of innocence and the Government's heavy burden of proof in a criminal case.

What counsel did say in closing was, in every sentence, so negative or neutral in tone--without a single affirmative statement

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13/ The complete summation by defense counsel is set out in the Statement of the Case, at pp. 6-7, above. A similar question of ineffective assistance of counsel in closing argument, involving the same attorney, is pending before this Court in Matthews v. United States, No. 21,798, remanded for hearing on other grounds, slip op. (not printed), June 23, 1969.

14/ The absence of such a presentation by defense counsel was emphasized by the trial judge's subsequent statement to the jury that opposing counsel "did mention evidence that constituted their recollection of that part of the evidence to which they thought you should pay special attention" (Tr. 91).

concerning the merits of Appellant's case--that it must have prejudiced Appellant in the minds of the jury. It was especially prejudicial for defense counsel to state in the context of this case (which raised a strong suspicion of Appellant's guilt) that counsel was "defending as best I can" (Arguments Tr. 5); that he thought that "this case will ultimately be decided in a relatively short period of time" (Arguments Tr. 6); and that it would be "insulting and imposing upon" the jury to argue more forcefully (Arguments Tr. 7). The jury undoubtedly understood that defense counsel had conceded his case and was merely "going through the motions" apologetically.

More is required in closing argument than such a "genuflection in the direction of justice . . . ."[15/] Defense counsel effectively abandoned his client at the last moment--at that stage of the trial when the jury was most likely to be sensitive to the statements of counsel. Whatever might have been counsel's evaluation of the merits of Appellant's case, he had an obligation to make the most of that case. In a situation far less demanding of an immediate defense of the accused, this Court stated:

"The fact that the chances of prevailing are slim is not

15/ McKenna v. Ellis, 280 F.2d 592, 601 (5th Cir. 1960), modified on other grounds, 289 F.2d 928, cert. denied, 368 U.S. 877 (1961).

> "[T]he relevant consideration is not whether the case was lost where it could have been won, but whether counsel 'stood still and did nothing,' Williams v. Beto, . . . [354 F.2d 698, 706 (5th Cir. 1965)], to the extent that his representation failed to render reasonably effective assistance to the accused. * * * When appearance of Counsel takes on the cloak of pro forma rather than that of zeal and action, the defendant has not had his day in court. Powell v. State of Alabama, 1932, 287 U.S. 45 . . . ."
> Smotherman v. Beto, 276 F.Supp. 579, 586 (N.D.Tex. 1967).

> a reason for withdrawal, but is rather a summons to conscientious counsel to devote his professional skill and pertinacity to the most effective presentation of which he is capable."[16]

That a sufficiently improper closing argument by defense counsel is reversible error was established in Clark v. United States, 104 U.S.App.D.C. 27, 259 F.2d 184 (1958), in which the Court reversed a judgment of conviction where the defense counsel failed in his closing argument to mention an insanity theory raised by the evidence at trial. The majority so held even though the trial judge had correctly instructed the jury on the insanity defense. Judge Burger dissented because he viewed the record as showing that defense counsel's closing argument for a lesser-included-offense verdict was deliberate and proper trial strategy; however, Judge Burger stated: "I do not suggest that a basis for reversal could not be grounded on ineffective assistance of counsel for failing to press an essential or central element of defense." 104 U.S.App.D.C. at 30, 259 F.2d at 187.

In the case at bar no element of defense was presented in closing argument for Appellant. And this failure by defense counsel, together with the defeatist tone of his entire summation, "might be taken as an admission that he did not believe in his case."[17]

Due process of law and the right to counsel guaranteed by the Fifth and Sixth amendments to the Constitution include the right of the

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16/ Tate v. United States, 123 U.S.App.D.C. 261, 269, 359 F.2d 245, 253 (1966).

17/ Drinker, Legal Ethics 147 (1953) (in context of explanation of why lawyer should not state to jury his personal belief in the soundness of his case), quoted in Harris v. United States, --U.S.App.D.C.--,--, 402 F.2d 656, 659 (1968).

accused to have counsel be heard in summation before verdict, even when the Government's case against the accused is overwhelming.[18] Absent an express and intelligent waiver by the defendant, this essential right cannot be denied to the defendant by court-appointed counsel,[19] certainly not where such conduct by counsel is unrelated to a positive trial strategy.[20] Defense counsel's closing remarks could not have been a trial tactic for Appellant's benefit. Further, those remarks were far more prejudicial than a simple waiver of argument, because they operated as a confession of weakness by Appellant. Thus, it is clear that defense counsel, in closing as he did, denied his client a valuable right.

18/ United States ex rel. Wilcox v. Pennsylvania, 273 F.Supp. 923 (E.D.Pa. 1967); New York v. Marcelin, 23 App. Div. 2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965); Yopps v. Maryland, 228 Md. 204, 178 A.2d 879 (1962); Fish v. Virginia, 208 Va. 761, 160 S.E.2d 576 (1968); 23A C.J.S., Criminal Law § 1082; Thompson on Trials § 921 (2d ed. 1912).

19/ See e.g. North Carolina v. Hardy, 189 N.C. 799, 802, 128 S.E. 152, 153 (1925) ("It is not only the right, it is also the duty of counsel to argue to the jury the case for the defendant . . ."); Pennsylvania v. Brown, 309 Pa. 515, 524, 164 Atl. 726, 729 (1933) ("It is his [the lawyer's] right and duty to discuss the evidence in a light most favorable to his client . . ."). See also Johnson v. United States, 71 App. D.C. 400, 401 110 F.2d 562, 563 (1940): "It would be a strange system of law which first assigned inexperienced or negligent counsel in a capital case and then made counsel's neglect a ground for refusing a new trial. The right to counsel is not formal, but substantial."

20/ There may be circumstances in which a mutual and complete waiver of closing arguments by both Government and defense counsel is permissible as a matter of trial strategy, but even then, as Judge Burger implied in the Clark case, the record should at least be susceptible to a finding that defense counsel's waiver was in fact a trial tactic. See Johns v. Smyth, 176 F.Supp. 949 (E.D.Va. 1959).

> "The value of [closing] argument as an instrument of persuasion cannot be overestimated. * * * The advocate understands better than the jury the essential issues in the case and the particular evidence which is determinative of whether the required burden of proof has been met. The jury hears the law as stated by the court; but the advocate knows what the untrained trier of fact cannot be expected to know: the proper application of that law to the evidence. * * *"21/

As defense counsel noted in his summation (Arguments Tr. 6), the judge would give the jury the law (but see note 3, above); counsel was wrong in then stating that "along with the law should come the ultimate result," because the jury was never told by counsel or anyone else how the evidence would permit the factual findings necessary for Appellant's acquittal.

Appellant's theory of the case with respect to the most serious count--burglary--was obviously that he lacked the requisite specific intent to commit that crime. Yet at no point in the trial did defense counsel explain to the jury how the evidence could lead to a conclusion that Appellant lacked the requisite intent. Nor did defense counsel bring to the jury's attention the absence of any evidence establishing that a person was present in the house at the time of Appellant's entry. See Argument I, above.

There was, in addition to Appellant's own testimony concerning his heavy drinking and lack of memory, evidence which could have been advantageously reviewed by defense counsel in his closing argument. For example, there was the testimony that Mrs. Bellinger's son first noticed Appellant because he "saw a foot up on the bed" (Tr. 11), a phenomenon arguably more consistent with drunkenness than with a guilty concealment.

21/ Busch, Law and Tactics in Jury Trials 957-58 (1949).

(Apparently there were two beds in the "double bedroom" "big enough for two beds" (Tr. 13), and the hearsay statement of Mrs. Bellinger's son might have indicated that, when first seen, Appellant was between the beds or partially under one bed with his foot resting on top of the other bed.) For similar purpose trial counsel might have noted that upon his discovery Appellant "didn't move" (Tr. 11) and certainly did not react by immediately running away, as a fully-conscious person might have been expected to do. The testimony of Mrs. Bellinger and Mr. Elmore was that Appellant remained under the bed even while Mrs. Bellinger gathered her children and went downstairs, while she told Mr. Elmore what she had seen, and while he ascended the stairs and went through the kitchen (Tr. 11-12; 16-17).

It was open to defense counsel to argue that these facts were consistent with Appellant's recollection and non-recollection and with the absence of any evidence permitting more than speculation concerning the manner of Appellant's entry into the house and whether anyone was there when he entered.[22/] While admitting that Appellant could not provide the jury with complete explanation of his presence in the house (because of Appellant's drunkenness at the time of entry), defense counsel could have offered one or more hypotheses of what might have happened. For example, appellant, in a drunken stupor, might have wandered quite

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22/ Instead, the jury probably understood defense counsel to be conceding that there was an irreconcilable conflict in the testimony, when he stated (Arguments Tr. 6): "I am not going to characterize the tesimony of any witness here or indulge in any judgment of my own as to who is credible and who is not. I will leave that to you."

innocently into the house through an open or unlocked front door, seeking a place to rest--perhaps seeking his own house. He might have dimly perceived the danger to himself and instinctively picked up a kitchen knife and placed himself alongside or under a bed for self-protection. Later upon being discovered and eventually awakened in a strange house, it would have been natural, under such circumstances, for him to flee and to seek to elude his pursuer.[23/] If Appellant were then "sobering-up", this fact would help explain also what the prosecutor in his closing argument called Appellant's "selective recollection" (Arguments Tr. 5).

The jurors could have been told that even if they should completely disbelieve Appellant concerning his lack of memory about these events, they must recognize that in the panic of discovery, after an unauthorized entry into the house for whatever purpose, it would have been natural for Appellant, as he moved through the kitchen toward the stairs (see Tr. 16-18), to take Mrs. Bellinger's kitchen knife to frighten off his pursuer. In the absence of any evidence of exactly when Appellant took the knife, and in the absence of any other evidence bearing upon Appellant's intent at the time he entered the house, the jury could not conclude beyond a reasonable doubt from the mere taking of the knife that Appellant entered with an intent to steal--a necessary element of the crime of burglary charged in this case.

23/ It is significant that the judge's instruction on flight and concealment (Tr. 98) has since been specifically disapproved by this Court, at least insofar as flight is concerned. Austin v. United States, D.C. Cir. No. 22,044, decided May 27, 1969, slip op.

Because defense counsel elected not to request an instruction on the lesser-included offense of second degree burglary, it was incumbent upon him to explain to the jury how the evidence would not support a verdict of first degree burglary because of a lack of proof that any person was in the dwelling at the time Appellant entered.

The point is not that the presentation of bona fide argument would have necessarily or even probably convinced the jury that Appellant was not guilty of the crime of burglary; but it was possible that such argument could have created in the minds of the jury that reasonable doubt requiring them to find Appellant not guilty. "The defense lawyer should grasp the difficult or awkward points in the evidence and explain them away. Otherwise he can not hope to win. His explanation should be as reasonable as he can make it." Stewart, Trial Strategy 431 (1940). Appellant's trial counsel presumably had ample opportunity to prepare for closing argument during the overnight recess (Tr. 79). Yet he did not even argue that valuable last refuge of all criminal defenses--the presumption of innocence and the reasonable-doubt standard. Indeed, it might be said that, by his own attitude, defense counsel effectively, albeit unintentionally, stripped his client of that protection.

In Bruce v. United States, 126 U.S.App.D.C. 336, 339, 379 F.2d 113, 116 (1967), the Court explained that the requirement for judgment reversal--as stated in previous ineffective counsel cases--that the trial must be found to be "a mockery and a farce" was "not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness." The Bruce opinion also

noted that a less powerful showing of inadequate representation is necessary to sustain a direct appeal than a collateral attack. 126 U.S.App.D.C. at 340, 379 F.2d at 117.

Whatever test is applied to the closing argument in this case, the conclusion is required that Appellant was effectively denied assistance of counsel at a crucial point in the trial. The error of the summation was more than an error of judgment or skill; it was so basically contrary to the purpose of closing argument that it deprived Appellant of a "fair trial." Mitchell v. United States, 104 U.S.App.D.C. 57, 64, 259 F.2d 787, 794, cert. denied, 358 U.S. 850 (1958). It was the duty of the trial court to observe that kind of error and to correct it if possible. Diggs v. Welch, 80 U.S.App. D.C. 5, 8, 148 F.2d 667, 670, cert. denied, 325 U.S. 889 (1945). See Glasser v. United States, 315 U.S. 60, 71 (1942).

The fact that Appellant's trial counsel was court-appointed and should have asked to withdraw if he could not conscientiously represent Appellant are also important considerations here. As the Court stated in Suggs v. United States, 129 U.S.App.D.C. 133, 136, 391 F.2d 971, 974 (1968):

> "It is of importance in the interest of justice that the final judgment against an indigent should not be compromised by the possibility that a different result would have ensued if only he had the resources to retain his own lawyer, instead of being required to accept counsel selected by the court. Much depends on a system that avoids suspicion of such compromise, for reasons that include awareness that where there is a basis for such suspicion prospects of rehabilitation are stifled. Justice must not only be done, it must appear to be done. Offutt v. United States, 348 U.S. 11, 14 . . . (1954). Appointed counsel is of course not required to accept a client's views by asserting points his good conscience would reject even at the loss of a handsome fee. At the same time counsel cannot file a brief against his

> client. It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when the counsel appointed by one arm of the Government seems to be helping another to seal his doom. The courts of course are not required to honor all the indigent's wishes as to counsel. But the courts must do what can reasonably be done to leave indigent prisoners with the impression that they have been dealt with fairly."

From the foregoing it can only be concluded that however strong the Government's case might have been, Appellant's trial counsel failed to adequately fulfill his role as an "active advocate" at the critical stage of closing argument. See Anders v. California, 386 U.S. 738, 744 (1967). Therefore, the judgment of conviction must be reversed and the cause remanded to the District Court for a new trial on all counts upon which Appellant was convicted and not to be acquitted by judgment n.o.v. for reasons set forth in Argument I, above.

While the record may not conclusively show defense counsel conduct which in any particular other than closing argument was sufficient error alone to warrant the legal conclusion of ineffective assistance of counsel, the record viewed as a whole does justify the conclusion that, throughout trial and sentencing, defense counsel's performance was "perfunctory" and "mechanical,"[24/] and lacked the "entire devotion" and "warm zeal" required of a lawyer.[25/] Considering the prejudicial character of defense counsel's summation, it would have taken a "brilliant performance" to overcome that error. See Stem v. Turner, 370 F.2d 895, 900 (4th Cir. 1966).

24/ Martin v. Virginia, 365 F.2d 549, 552 (4th Cir. 1966).

25/ Braxton v. Peyton, 365 F.2d 563, 565 (5th Cir.), cert. denied, 385 U.S. 939 (1966); ABA Canons of Professional Ethics, Canon 15.

Of independent as well as cumulative significance is the fact that defense counsel was not present at arraignment and that the court ordered a plea of not guilty to be entered for Appellant over the latter's specific objection that he did not wish to say anything without advice of counsel (Arraignment Tr. (one page)).[26/] A recent opinion of this Court raises the question whether, even without a showing of prejudice, the absence of Appellant's attorney at arraignment voids that proceeding and the subsequent trial of Appellant. In dictum in United States v. Ridley, D.C. Cir. No. 22,426, decided May 29, 1969, slip op., p. 2, n. 2, which involved an uncounseled not guilty plea at arraignment, the Court distinguished earlier cases to the contrary and stated:

> "Lack of counsel at arraignment is symptomatic of the accused's not having counsel during other early stages of the case following indictment, and the [Criminal Justice Act] Plan's requirement of counsel at arraignment was designed to assure the presence of counsel for other important purposes as well. That objective of the Plan is not advanced by invariably requiring an appellant to show actual prejudice in respect of the arraignment in order to complain of the lack of counsel at that time."

(The requirement and importance of early representation by counsel is discussed in Brief for Appellant, United States v. Ridley, supra, Feb. 14, 1969, pp. 11-22.) Defense counsel's unexplained absence at the arraignment of Appellant is thus another reason for careful evaluation of counsel's efforts on behalf of Appellant.

26/ The recitation of the District Court in the July 5, 1968 Plea of Defendant (which is a part of the appeal record) that Appellant's trial counsel was present at arraignment is clearly erroneous, as the transcript of the arraignment shows.

If the record on appeal does not convince the Court that Appellant was denied effective assistance of trial counsel, the Court should remand the case to the District Court for further fact-finding.[27/]

27/ In addition to the matters of record, there are also certain allegations of fact which have been made to appellate counsel by Appellant--both orally and in a sworn affidavit--which raise other questions concerning the adequacy of pretrial assistance of counsel. In present counsel's opinion, the allegations (if not mooted by this Court's action) should be considered by the District Court together with the entire record and the opinion of this Court. In view of the Court's statements in Johnson v. United States, No. 21,851, decided June 20, 1969, slip op., p. 10, and Suggs v. United States, --U.S.App.D.C.--,--, 407 F.2d 1272, 1276 n. 5 (1969), the substance of Appellant's affidavit is not stated here.

CONCLUSION

The Court should reverse the verdict and judgment of the District Court.

If the Court agrees with Appellant's Argument I.A. (insufficient evidence of specific intent), the cause should be remanded to the District Court with directions to enter a judgment of not guilty of burglary, non obstante veredicto.

If the Court disagrees with Argument I.A., but agrees with Argument I.B. (insufficient evidence of another person's presence at time of entry), the cause should be remanded for a new trial on a charge of second degree burglary.

Further, the cause should be remanded for a new trial on all counts upon which Appellant was convicted and is not to be acquitted by reason of this Court's judgment, because Appellant was denied effective assistance of trial counsel. If this Court nevertheless decides a new trial is not required by the present record, certain facts and allegations concerning Appellant's representation by defense counsel prior to trial suggest that there should be a remand of the case for additional factual determinations by the District Court.

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July 1, 1969

APPENDIX

Section 1801 of Title 22 of the District of Columbia Code (1967 ed., Supp. II-1969):

§ 22-1801. Burglary—Penalties.

(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than five years nor more than thirty years.

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,744

UNITED STATES OF AMERICA

v.

CHARLES HAMMONDS,

Appellant.

On Appeal from a Verdict and Judgment of the
United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

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(By Appointment of the Court)

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REPLY BRIEF FOR APPELLANT

I

A. In its brief (p. 8), the Government has cited court opinions involving circumstances which permit an inference of burglary. Appellant has already shown, at pp. 9-10 of his initial brief, that the critical factors relied upon in those and other cases, where a sufficiency of evidence was found, are absent from this case. The facts to which the Government points in this case raise suspicion, and would permit conviction for unlawful entry on property of another (Appellant's Br. 11), but these facts could not prove by implication--beyond a reasonable doubt--that Appellant entered with intent to steal.

B. The Government ignores that, for a conviction of first degree burglary, it had a burden to prove beyond a reasonable doubt that complainant Elmore was present in the house "at the time of such breaking and entering, or entering without breaking" (22 D.C. Code § 1801(a)).

The Government first contents itself with arguing that the circumstances "could suggest" and were "consistent with" a finding that Appellant entered the house shortly before being discovered (Gov't Br. 10). That there were no facts upon which the jury could do more than speculate on this theory, or upon the further supposition in the Government's brief (pp.10-11) that complainant Bellinger had been home for a long period of time,[1/] does not deter Government counsel from arguing that the necessary inferences were permissible.[2/]

Just as weak is the Government's effort (Br. 11-12) to re-write the clear language of the burglary statute by an appeal to the "apparent intention" of Congress in providing for two degrees of burglary. Whatever wisdom there may be in the Government's idea of a proper burglary statute, that idea cannot displace the reality of

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1/ The Government is incorrect if, in stating that "Mrs. Bellinger testified that she was home that evening," it meant to imply that she was home the entire evening. She answered "Yes, I was," to the question: "Now, directing your attention, Mrs. Bellinger, to the evening of April 26, 1968, approximately 9:00 or 9:45 p.m., were you home on that evening?"

2/ Because there is no proof whatsoever that <u>anyone</u> was at home when Appellant entered, it is academic to discuss the need for evidence about Mr. Elmore's whereabouts (Gov't Br. 10 n.7). Nevertheless, it may be noted that Appellant's position is that such evidence was necessary, because the grand jury made the critical preliminary finding of presence regarding Elmore alone.

the District of Columbia Code, which, for first degree burglary conviction, requires proof that a person was inside the dwelling "at the time of such breaking and entering, or entering without breaking."

The Government would transform the statutory phrase "at the time of such . . . entering without breaking" (there was no evidence of breaking by Appellant) into what it calls an "entry," by which it really means the accused's continued presence inside the house. If that were so, the specific intent to steal required at such time of "entry" could be satisfied by such intent at any time the trespasser is inside the house--contrary to all precedent. The crime of burglary is complete upon the entry, and the presence in the house of other persons thereafter, like an intent formed subsequently, does not affect the burglarious conduct.

A case exemplifying the latter points is North Carolina v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967), interpreting a first degree burglary statute (N.C. Gen. Stat. § 14-51) similar to that of the District of Columbia. In that case defendant had been discovered in a dwelling about 1:00 a.m., the occupants having then awakened from sleep. The occupants had been home all that evening except between 11:00 and 11:30 p.m., at which latter time they retired to bed. The Supreme Court of North Carolina held (270 N.C. at 595, 155 S.E.2d at 274):

> "If the burglary occurred--i.e., the breaking and entry occurred--while the dwelling house was actually occupied, that is, while some person other than the intruder was in the house, the crime is burglary in the first degree. If

> the house was then unoccupied, however momentarily, and whether known to the intruder or not, the offense is burglary in the second degree."

The court so held even though presence of a person in the dwelling at any time during "the commission of such crime" of burglary sufficed under the North Carolina statute for first degree burglary. A decisive factor, then, was the time period of the "commission of such crime." The court clarified the critical time period when it stated (270 N.C. at 594, 155 S.E.2d at 274):

> "The offense of burglary is breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived." (Emphasis added.)

In the quotations above, the North Carolina court was explaining breaking-and-entering language long used to define a common law and statutory crime (see 13 Am. Jur., Burglary § 10). The Government's interpretation of the critical time period of "breaking and entering, or entering without breaking," in the District of Columbia Code provision on burglary, is thus untenable. The Court should resolve any doubt by adhering to the policy of strictly construing criminal statutes in favor of the accused.

Finally, the Government suggests (Br. 11 n. 8) that retrial for second degree burglary is unnecessary if insufficiency of evidence for an element exclusive to first degree burglary is the sole error. The Government encourages the Court to exercise its authority to modify a criminal judgment, by reducing Appellant's conviction to the lesser included offense of second degree burglary

and remanding the case for re-sentencing. In both Austin v. United States, 127 U.S.App.D.C. 180, 193, 382 F.2d 129, 142 (1967), and Allison v. United States, --U.S.App.D.C.--, 409 F.2d 445, 450-51 (1969), the Court "emphasized, however, that the circumstances in which such authority may be exercised are limited. It must be clear . . . that no undue prejudice will result to the accused." 409 F.2d at 451.

Here, it appears that Appellant has already been prejudiced by the jury's impermissible finding or presumption that several persons were present in the house at the time of Appellant's entry therein. Believing that the house was at that time actually so occupied would lead the jury to conclude that Appellant could not have wandered into the house in a drunken condition, as his testimony would indicate, without being seen by someone in the house--that, instead he must have entered by stealth.

Therefore, if not completely acquitted of burglary for insufficiency of evidence of specific intent to steal, Appellant should be retried for second degree burglary, at which time he would have the opportunity to show that no one else was present in the house at the time he entered and to argue that this fact is consistent with his theory that he entered aimlessly without stealth and without intent to steal.

II

The Government has taken issue with Appellant's contentions that defense counsel's closing argument was gross error and that the record as a whole shows defense counsel's overall representation of Appellant was mechanical and at best perfunctory.

The hypothetical explanation offered by the Government (Br. 15-16) for defense counsel's decision not to argue his case is unsatisfactory. That closing argument might have been "unavailing" is beside the point. That an argument of the evidence most favorable to Appellant could have placed Appellant in a position worse than the one in which he found himself at that moment is incredible; on the contrary, it was defense counsel's duty to use closing argument to attempt to bring the facts into a perspective advantageous to his client. Certainly counsel could have argued insufficiency of evidence to the jury if present counsel can do it before this Court. The sole purpose of present counsel's exercise in suggesting a possible closing argument for Appellant (Br. 19-22) was to demonstrate that such an attempt was feasible. Such an attempt was also necessary to avoid the negative implication which arose from what trial counsel did and did not say about the case.

The Government seeks to distinguish Clark v. United States, 104 U.S. App.D.C. 27, 259 F.2d 184 (1958), as a case in which, as a result of the closing argument by defense counsel, "the jury may very well have been confused" by abandonment of a defense theory

upon which evidence was adduced at trial (Gov't Br. 15 n.12). The abandonment of an insanity defense by counsel in that case was much more justifiable as a trial tactic to win the jury to a lesser included offense verdict (as Judge Burger viewed it in his dissenting opinion) than the complete abandonment of Appellant by trial counsel in this case. In Clark, Judge Burger was moved to agree that reversal for ineffective assistance of counsel could result from counsel's "failure to press an essential or central element of defense." 104 U.S.App.D.C. at 30, 259 F.2d at 187.

An answer to the Government's assertion (Gov't Br. 14) that the record as a whole shows that trial counsel "conducted a spirited defense" is found in Appellant's initial brief, both in the Statement of the Case and elsewhere (Appellant's Br. 2-7, 24-26). From the Statement of the Case, it can be seen that defense counsel did not act upon the discrepancy (which was obvious on the face of the papers) between the grand jury presentment and the indictment, the latter including the additional charge of assault on a member of the police force (22 D.C.Code § 505(a)), of which Appellant was acquitted at trial. Nor did defense counsel appear at arraignment, even though he had been appointed theretofore. Defense counsel filed no pretrial motions on behalf of Appellant--not even for pretrial release. 3/

3/ Appellant's non-record allegations raising questions concerning inadequate pretrial assistance of counsel (Appellant's Br. 26 n. 27) could be explored by the District Court while this Court retains jurisdiction, if the Court believes that such further evidence may be critical to its decision. The Government's objection (Gov't Br. 13 n. 9) that Appellant "alluded to" this matter in his brief is misplaced. See United States v. Kearney, D.C.Cir. No. 22,411, slip op., pp. 5-7 n.4, decided August 15, 1969. Appellant's counsel stands ready to inform the Court of Appellant's specific, sworn allegations, if the Court desires this information.

Defense counsel asked no questions at the empanelling of the jury, even though neither the Assistant U.S. Attorney nor the court asked the questions usually asked by defense counsel or the court. Defense counsel made no opening statement to the jury, which means that at no time was the evidence put into a perspective and argument made for Appellant's theory of the case. Defense counsel conducted no cross-examination of two Government witnesses and only slight cross-examination of two other witnesses.[4/] His short redirect examination of Appellant was pointless. There was no cross-examination of the rebuttal witnesses. The prosecutor--not defense counsel--was primarily responsible for the dismissal of the petit larceny count, by bringing an error in the indictment to the attention of the court.

Defense counsel asked for no jury instructions or changes in the instructions, even though, as Appellant's initial brief (e.g., Br. 8-9 n.3, 21 n.23) indicates, the instructions did not well serve Appellant. Counsel did not even request lesser-included offense instructions; yet he made no closing argument to show why a verdict for the greater offenses should not be returned by the jury.

4/ Even the Government's weak statement that "[i]t is entirely possible that counsel's brief but pointed cross-examination of Officer Hicks carried the day" on the acquittal of Appellant for the least serious offense with which he was charged--assault on a police officer (not to be confused with assault on a police officer with a dangerous weapon, of which he was convicted)--is refuted by the transcript (Tr. 30-31).

We pass by the closing statement of defense counsel and note that he declined the trial court's invitation to speak to the question of bond after conviction. He also declined the court's invitation to speak for Appellant at sentencing.

Was this a "spirited defense"? The record as a whole supports the conclusion that defense counsel was derelict in his duties and failed to make the requisite closing argument on behalf of Appellant.

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September 4, 1969